No. 15-674

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER HOMELAND SECURITY, JUSTICE, AND STATE DEPARTMENT OFFICIALS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The question presented is:

Whether Petitioners' proposed Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program is consistent with the Immigration and Nationality Act (INA) and with long-settled congressional-executive understandings regarding the scope of executive discretion under the statute.

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INTEREST OF *AMICI CURIAE*[1]

Amici, who have served in senior positions in the Executive Branch on immigration and national security issues, have acquired substantial experience in the granting of deferred action.[2] Two *amici* were closely involved in a grant of deferred action or other temporary relief to fifteen spouses and children of 9/11 victims. One of these victims had a temporary employment visa; the other victims had worked at the World Trade Center in New York City after having entered or remained in the U.S. without a legal status.

Petitioners argue that actions taken by some of the *amici* in previous administrations serve as precedents for the program challenged in this case. They do not. *Amici* explain in this brief that those earlier examples of immigration relief were carefully constrained by both law and prudence, serving only as a bridge to a legal status authorized by a then pending Act of

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[1] Rule 37 statements: Petitioners and Intervenors-Respondents Jane Does were timely notified and filed blanket consents to the filing of *amicus* briefs. Respondents the State of Texas et al. consented by letter to this filing. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

[2] Stewart A. Baker served as the first Assistant Secretary for Policy in the U.S. Department of Homeland Security (DHS). Paul Rosenzweig served as Deputy Assistant Secretary for Policy at DHS. Nicholas Rostow served as General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations. Rick Valentine served as Deputy Assistant Attorney General, supervising the U.S. Department of Justice's Office of Immigration Litigation. *See* Appendix A for further information about *amici*'s government service, other relevant experience, and publications.

Congress or by visa categories already present in the Immigration and Nationality Act (INA).

Amici cabined the relief they provided because they believed both that the INA limited their discretion, and that exercises of sweeping, uncabined discretion such as Petitioners' proposed Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program could not be lawfully sustained. Furthermore, *amici* honored these limits because they were part of a long and consistent course of dealing between Congress and the Executive on the contours of immigration discretion.

That course of dealing has included programs, such as the Family Fairness initiative of President George H.W. Bush, that Petitioner has wrongly cited as supporting DAPA's sweeping relief. In submitting this brief, *amici* hope to ensure that the administration of immigration law will continue to reflect the traditional course of dealing in which grants of deferred action are either expressly authorized or ratified by Congress or ancillary to a grant of legal status. Such cabined discretion, in *amici*'s view, best harmonizes Congress's aims of deterring unlawful immigration and ensuring the fair and effective operation of the United States' avenues for *legal* immigration.

SUMMARY OF ARGUMENT

Amici are a group of former government officials responsible for immigration policy in earlier administrations. In particular, *amici* include officials who authorized deferred action for the families of workers at the World Trade Center who had unlawfully entered or remained in the U.S. and who died on 9/11. Congress had not expressly authorized that relief when it was granted. As a result, *amici* carefully cabined the relief provided to this small group of 9/11 victims' families.

Petitioners have sought to rely on 9/11-related deferred action as a precedent for the more sweeping discretion that DAPA embodies. *See* Brief for the Petitioners, United States v. Texas, No. 15-674 (March 2016) (hereinafter Pet. Brief), at 6-7. In so doing, Petitioners ignore the limitations that were part of the 9/11 relief.

If ever there were a case for deferred immigration enforcement, 9/11 created one. Several of the individuals who lost their lives in the attack were working illegally in the World Trade Center, and most of their spouses and children had no legal status. In the words of one *amicus*, Stewart Baker, the Assistant Secretary for Policy of the Department of Homeland Security (DHS), these families shared with all Americans a "moment of loss and pain and pride that is now a defining part of our national history."[3]

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[3] *See* Letter from Stewart Baker, Assistant Secretary, U.S. Dep't of Homeland Security, to Debra Brown Steinberg, Esq., Aug. 15, 2008 (hereinafter Baker Letter, Aug. 15, 2008), Appendix B (redacted to omit client information), cited in U.S. House of Representatives Committee on the Judiciary Report on

But *amici* did not believe that the Executive could by fiat simply grant them what they deserved. The Assistant Secretary sought to tailor relief as closely as possible to Congress's overall plan. In particular, the Assistant Secretary framed that relief as a bridge to a legal status that was formally authorized by Congress: either under pending legislation that expressly granted legal status to the 9/11 relatives' group,[4] or pursuant to a U visa, available to victims of crime who cooperate with law enforcement.[5]

September 11 Family Humanitarian Relief and Patriotism Act of 2009, H. Rep. 111-667, 111th Cong., 2d Sess., text accompanying n. 7, available at https://www.gpo.gov/fdsys/pkg/CRPT-111hrpt667/html/CRPT-111hrpt667.htm (last visited March 6, 2016) (hereinafter Judiciary Committee Report on September 11 Relief Act).

[4] *See* A bill, "To provide the nonimmigrant spouses and children of nonimmigrant aliens who perished in the September 11 terrorist attacks an opportunity to adjust their status to that of an alien lawfully admitted for permanent residence, and for other purposes," H.R. 10171, Rep't No. 110-909, 110th Cong., 2d Sess. (Feb. 15, 2007) (introduced by Rep. Maloney), available at https://www.congress.gov/bill/110th-congress/house-bill/1071/text (last visited March 25, 2016); Judiciary Committee Report on September 11 Relief Act, *supra* n. 3.

[5] Judiciary Committee Report on September 11 Relief Act, *supra* n. 3, text accompanying n. 7 of the Report. The 9/11 relatives received either deferred action or another temporary form of relief, humanitarian parole. The attorney who negotiated with DHS on behalf of the 9/11 relatives group recently confirmed that, as of March, 2016, all of the individuals she personally represented were awarded U visas and have either adjusted to lawful permanent resident (LPR) status or are in the process of adjusting to LPR status. Conversation with Debra Brown Steinberg, Esq., (March 23, 2016) (hereinafter Steinberg Conversation).

Amici limited the 9/11 relief for a reason. Congress had made abundantly clear its hostility to sweeping immigration relief that is not tied to existing law. That hostility is grounded in experience. While setting immigration enforcement priorities mainly affects the fate of individual illegal immigrants, Congress has consistently expressed concern that illegal immigration hurts the job prospects of U.S. citizens and lawful permanent residents (LPRs). *See* Committee on the Judiciary, U.S. House of Representatives, 104th Cong., 2d Sess., H.R. Rep. No. 104-469, at 108 (March 4, 1996) (hereinafter 1996 House Judiciary Report) (noting that "employment of illegal aliens ... causes deleterious effects for U.S. workers").

In this respect, as in any matter of statutory interpretation, *amici* have always taken the view that the touchstone is Congress's intent, not whether economists would all agree with Congress's analysis. Indeed, *amici* themselves have a range of views on the extent to which unlawful immigration affects the employment of U.S. citizens and LPRs.

Amici agree, based on their experience, that Congress closely monitors any exercise of executive discretion under the immigration laws to ensure that it does not exceed Congress's intent. The 9/11 families' relief initiated by *amici* and the other past exercises of discretion were limited by this principle. They served as short-term bridges to relief that seemed certain to be authorized by Congress or to an existing statutory grant of legal status.[6] Had *amici*

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[6] The term, "legal status," refers to a statutorily recognized basis for an immigrant or nonimmigrant visa that will allow the recipient of the status to enter or remain in the United States.

shared the legal view now urged by Petitioners – that the executive could simply grant that relief in a bold and uncomplicated gesture – they would have done so. They did not.[7] Nor should this Court.

Given their experience, *amici* readily acknowledge the distinction between granting discretionary *benefits* such as employment authorization and setting enforcement *priorities*. The latter is simply a matter of prosecutorial forbearance that will inevitably turn on available resources and other matters appropriately left to administrative discretion. However, DAPA's effects are different in kind, since DAPA clashes with long-settled congressional-executive understandings on the scale and scope of employment authorization for foreign nationals without either a legal status or a reasonable prospect of obtaining such a status. *See Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015) (noting that DAPA "would allow [undocumented noncitizens] to receive the benefits of lawful presence

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See, e.g., 8 U.S.C. § 1151(b)(2)(A)(i) (2016) (defining "Immediate Relative" eligible for immigrant visa as, inter alia, the parent of a U.S. citizen, provided that the citizen sponsoring a parent is "at least 21 years of age").

[7] Indeed, two *amici* recall that during a wide ranging discussion intended to canvass all possible avenues of relief for the 9/11 relatives, one staff attorney suggested the adoption of a DAPA-like use of extended prosecutorial discretion combined with a work authorization. *Amici* (and their staff) all quickly concluded that such a proposal was unlawful and inconsistent with settled legislative-executive understandings. That position, unthinkable just eight years ago, is now portrayed by Petitioners as longstanding Executive Branch practice.

... without any of the requirements ... that Congress has deliberately imposed").

ARGUMENT

I. Deferred Action to Spouses and Children of the September 11 Attacks' Undocumented Victims Was Ancillary to a Grant of Legal Status

One *amicus*, Stewart Baker, when serving as Assistant Secretary of DHS for Policy, authorized deferred action and other temporary relief that was a bridge to a legal status for a small group that shared a special tragedy: spouses and children of noncitizens who had either entered without inspection or overstayed and subsequently were slain in the September 11 attacks.

The need for deferred action arose because among the three thousand victims of the September 11 attacks were a number of foreign nationals without a lawful immigration status who worked at Windows on the World or other locations in the World Trade Center in New York City. After the attacks that cost the lives of these victims, their spouses and children were left with a grievous loss and no place to turn. As then-Assistant DHS Secretary Baker said in a letter to the relatives' attorney, members of the group were still "at risk of arrest and removal by immigration authorities." *See* Aug. 15, 2008 letter, *supra* note 3.

The human reasons for granting relief were, in *amici*'s view, overwhelming. "The members of this small group share with all Americans a moment of loss and pain and pride that is now a defining part of our national history." *Id.* Although the relatives were not U.S. nationals, their lives were "linked to the

United States of America by a bond that is intimate and unique." *Id.*

But Congress had not expressly provided relief for these victims of terror. Congress *had* expressly authorized immigration relief for another cohort of 9/11 families: alien spouses and children of *U.S. citizens* killed in the attacks, and alien spouses and children who were intended beneficiaries of pending visa petitions by slain LPRs. *See* USA PATRIOT ACT, § 423, Pub. L. No. 107-56, 115 Stat. 360-61 (giving members of this group an opportunity to file a petition for an immigrant visa).

Petitioners view the targeted relief that Congress *expressly authorized* for relatives of LPR 9/11 victims as precedent for the sweeping relief that Petitioners provided in DAPA without express congressional authorization. *See* Pet. Brief at 6-7. That analogy badly misses the mark. Congressionally authorized action cannot serve as precedent for Executive action that has no support from Congress.

In contrast, *amici* saw the legislative exclusion of the 9/11 workers from legislative relief as a limit on executive discretion. When a*mici* used their executive discretion to grant the 9/11 relatives relief, legislation to provide a formal legal status to the group was pending and expected to pass without controversy, *see supra* note 4. While prospects seemed good for passage, the legislative process can be slow, and in the meantime the risk of deportation loomed over the families. In this context, *amici* believed that a short-term grant of executive relief was necessary as a bridge to statutory relief.

In case *amici* were wrong about Congress's willingness to act, however, the short term grant of

relief was also intended to allow the families time to undergo the long and slow process of qualifying for a U visa, which is available to victims who cooperate with law enforcement. *See* Judiciary Committee Report on September 11 Relief Act, *supra* note 3 (text accompanying Report's n. 7). U visas were a realistic prospect in 2008, when DHS announced that it was granting deferred action or other temporary relief to the 9/11 relatives' group. At the time, U.S. law enforcement officials wished to preserve the option of calling the relatives as witnesses in the sentencing phase of the prosecution of Zacarias Moussaoui, who had pleaded guilty to charges related in part to the September 11 attacks. *Id.*; *see also United States v. Moussaoui*, 591 F.3d 263, 299-300 (4th Cir. 2010) (upholding Moussaoui's conviction and discussing 9/11-related charges).

In the end, Congress did not adopt relief for these 9/11 relatives. Instead, the relatives applied for U visas or for another legal status. A significant number of the 9/11 group have received a legal status as of March, 2016, and *amici* are unaware of any member of the group who has been denied a legal status. *See* Steinberg Conversation, *supra* note 5.

Amici tailored their relief to 9/11 victims so carefully because they believed then, and continue to believe, that the INA limits executive discretion out of an abiding concern for the employment prospects of American citizens and LPRs. Congress has long expressed the view that the "magnet" of U.S. jobs attracts undocumented immigrants and disrupts the U.S. labor market. *See* 1996 House Judiciary Report, *supra*, at 108.

As Justice Stevens wrote for a unanimous Court in *INS v. National Center for Immigrants' Rights*, 502 U.S. 183 (1991), the "scope of ... discretion" under "the Act as a whole" rests in large part on the INA's "*concern with the employment* of excludable aliens." *Id.* at 193 (emphasis added). In light of these concerns, a decision to vastly increase the pool of potential workers is no mere exercise of prosecutorial discretion.

Past executive actions under the INA, including the 9/11 relief granted by *amici*, have recognized that constraint as a matter of law and prudence. The cabined nature of the relief provided by DHS to the 9/11 relatives is consistent with the longtime shared understanding of Congress and immigration officials. Discretionary relief should be "interstitial" in character, bounded by a robust limiting principle. It should be expressly ratified by Congress or be a bridge to a statutorily authorized legal status. That commitment to interstitial discretion led Assistant Secretary Baker and his DHS colleagues to tailor deferred action to the unique situation of the 9/11 relatives.

II. Interstitial Discretion, in Contrast to DAPA's Sweeping Relief, Fits the INA's Limits on Undocumented Migration's Disruption of the U.S. Labor Market

Amici exercised tailored discretion on behalf of the families of 9/11 victims because the INA, read as a "harmonious whole," *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (citation omitted), permits only interstitial discretionary benefits. Congress, far from acquiescing in uncabined exercises of discretion, has repeatedly sought to constrain executive discretion

under the INA. Those constraints stem from the "context and structure" of the statute, *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), and from Congress's fear that uncabined discretion would reinforce the "magnet" of U.S. jobs that attracts unlawful migration.[8]

Executive branch immigration officials agreed. In 1987, analyzing the very regulation relied on by Petitioners as authority for DAPA, Pet. Brief. at 7, 42, 46, immigration officials said that the "number of aliens authorized to accept employment is *quite small* and the impact on the labor market is *minimal*." *See* U.S. Dep't of Justice, Immigr. & Naturalization Service, *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46,092 (Dec. 4, 1987) (emphasis added). Indeed, officials claimed that the number of work authorizations was *so small* that it was "previously considered to be *not worth recording*." *Id.* at 46,093 (italics added). Government officials' assurance that the number of work permits was *too small to count* amply demonstrates the longtime legislative and administrative commitment to cabining this immigration benefit – a commitment that guided *amici*'s consideration as well.

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[8] *See* 1996 House Judiciary Report at 108. Immigration officials have long shared Congress's fear. *See* U.S. Dep't of Justice, Immigr. & Naturalization Service & Executive Office for Immigr. Rev., *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10324 (March 6, 1997) (hereinafter *Conduct of Removal Proceedings*) (conceding that, "it has long been recognized that employment provides a magnet that draws [noncitizens] to this country").

Amici have always recognized the distinction between granting discretionary *benefits* such as employment authorization and setting enforcement *priorities*. Setting immigration enforcement priorities is merely a decision to remove one person or group first, and leave other cases for another time. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (declining to review agency's "balancing ... of factors" entailed in setting enforcement priorities).

DAPA ventures far beyond the setting of priorities. It establishes a formal system for granting significant immigration benefits such as work permits to fully 40% of the foreign nationals who have entered or remain in the U.S. unlawfully. The blanket grant of benefits to such a large proportion of the undocumented population undermines the deterrent effect of U.S. immigration law, by allowing individuals who violate the law to gain a predictable, renewable employment advantage that Congress intended to place beyond their reach. *See Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015) (noting that DAPA "would allow [undocumented noncitizens] to receive the benefits of lawful presence... without any of the requirements... that Congress has deliberately imposed").

A. Congress Has Repeatedly Constrained Executive Discretion to Serve the INA's Deterrent Purposes

In the last quarter-century, Congress has engaged in myriad efforts to constrain executive discretion on immigration. Time and again, Congress has slapped down the Executive Branch when it adopted too broad a view of its discretion to grant immigration relief. Three examples of this practice are: 1) congressional

curbs on extended voluntary departure (EVD); 2) Congress's restrictions on parole of undocumented noncitizens from abroad; and, 3) rigorous congressional constraints on the remedy of cancellation of removal. The details of each confirm the integral place in the INA of constraints on administrative discretion and informed *amici*'s judgment in the 9/11 case.

Responding to persistent complaints of excessive discretion, Congress in 1996 imposed a strict 120-day time limit on the duration of EVD for noncitizens in removal proceedings. *See* 8 U.S.C. § 1229c(a)(2)(A). Congress took this action because, as immigration officials conceded, "[t]oo often, voluntary departure has been sought and obtained by persons who have no real intention to depart." *See* U.S. Dep't of Justice, *Conduct of Removal Proceedings*, *supra* note 8, at 10324. Congress's effort to cabin executive discretion to grant EVD would make little sense if immigration officials could circumvent these limits with sweeping awards of deferred action. *See* Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 Washburn L.J. 143, 159 (2015) (observing that, "[h]aving balked at the relatively modest discretionary benefits provided by EVD ... Congress would surely bridle at the cornucopia of benefits provided by DAPA").

Similarly, Congress required that parole of illegal entrants occur only on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 § 1182(d)(5)(A); *see id.* § 1182(d)(5)(B) (requiring a showing of "compelling reasons in the public interest with respect to [the] particular alien" whom the executive branch wishes to parole into the United

States). Congress limited parole because it found that parole had been "used increasingly to admit entire categories of aliens who do not qualify for admission under any other [immigration] category." 1996 House Judiciary Report at 140. If immigration officials could accomplish the same results through deferred action, as they have attempted to do in this case, those congressional controls on parole would be an exercise in futility.

In an especially telling example, Congress made the test for cancellation of removal even more rigorous. Cancellation of removal provides an important frame of reference for DAPA, since cancellation is the one remedy in the INA that is expressly available to noncitizens who, 1) have been unlawfully present in the U.S. for a year or more, and, 2) have no other reasonably direct path to a legal status. *See Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015) (describing the low eligibility standards for DAPA, as compared with cancellation of removal).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, Congress mandated that a foreign national without a legal status applying for cancellation of removal, which Congress limited to 4,000 grants annually, 8 U.S.C. § 1229b(e)(1), must show ten years of continuous physical presence in the U.S. and "exceptional and extremely unusual hardship" to a U.S. citizen or LPR spouse, parent, or child. *Id.* § 1229b(b)(1) (2015).

DAPA ignores this history and the policy considerations that underlie it. While DAPA, unlike cancellation of removal, would not formally grant a

legal status to its 4 million beneficiaries, it would confer many of the advantages of legal status on a cohort of noncitizens that Congress deliberately subjected to daunting barriers. Under the law as Congress wrote it, many unlawful entrants with post-entry U.S. citizen children must wait *decades* for a legal status that permits employment.[9] Under DAPA, the limits carefully constructed by Congress are rendered largely irrelevant; that same unlawful entrant will now receive an indefinitely renewable work permit and reprieve from removal.

Congress erected formidable barriers for a purpose: to channel prospective entrants into the INA's avenues for *legal* status. Although DAPA does not provide a formal grant of legal status, it is clear to *amici*, based on their experience in administering the INA, that DAPA's supplying of eligibility for work permits and a renewable reprieve from removal meets most unlawful entrants' near- to intermediate-term

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[9] Congress painstakingly devised an arduous obstacle course to discourage unlawful entrants from using post-entry U.S.-citizen children to gain immigration benefits. The most formidable barriers in the INA are the ten-year bar on admission to the U.S. of noncitizens who have been unlawfully present in the U.S. for a year or more, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and the citizen-sponsor age floor, which requires that a U.S. citizen be "at least 21 years of age" to sponsor a parent for an immigrant visa. *See* 8 U.S.C. § 1151(b)(2)(A)(i). For an unlawful entrant with a 1-year-old U.S. citizen child, Congress's design blocks legal status for *30 years*, with *a full decade* spent outside the United States. *Cf.* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 124 n. 50 (2015) (acknowledging that for many prospective DAPA beneficiaries, attainment of LPR status would occur "far in the future").

immigration goals.[10] DAPA thus blots out the signal that Congress has sought to send in ways that are fundamentally inconsistent with *amici*'s understanding of legislative limitations.

What's more, DAPA serves as an incentive for further illegal immigration. Foreign workers will make the practical observation that what the United States has done twice, it may well do again. Entering the country to work illegally may well be rewarded in the future, especially if that decision requires only a President's decision, and not a democratic consensus expressed in legislation. If Petitioners prevail in this case, only a veto-proof majority in both houses of Congress could stop a future extension of DAPA benefits.

As former executive branch officials, *amici* can attest that leaving a veto-proof majority of each legislative chamber as the sole barrier to immigration officials' discretion would constitute a temptation difficult to resist. Indulging that temptation would undermine Congress's careful compromise between deterrence and discretionary relief and add momentum to illegal immigration's "driving force": the lure of U.S. jobs. *See* 1996 House Judiciary Report, at 108. That is a temptation that Congress, in

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[10] The primary tangible benefit of a grant of formal legal immigrant status – the ability to sponsor close relatives for admission to the United States – is to a significant extent irrelevant to prospective DAPA grantees. By definition, prospective DAPA recipients' children who have been born in the U.S. are *already* U.S. citizens, who need no immigration help. Recipients' spouses, like recipients themselves, will also typically qualify for DAPA grants as parents of U.S. citizens.

the long course of its dealing with immigration officials, has sought to foreclose.

B. DAPA Does Not Fit the Categories of Discretion Permitted by the INA's Purpose, Logic, and Structure

To be consistent with Congress's clear history of curbing executive discretion in the award of lawful status, immigration benefits should be either expressly authorized by Congress or bridges to a status authorized by Congress.[11] All of the instances of relief that Petitioners cite as precedents for DAPA fit within these rubrics.

For example, immigration officials granted deferred action to applicants for U and T visas, which are respectively available under the INA to victims of crime generally and victims of human trafficking in particular. Officials did so to facilitate an orderly adjudication process for these visas; it made little sense to remove applicants to their countries of origin with their applications pending, since processing the applications would require interviews at local immigration offices in the United States.

Congress quickly ratified this common-sense administrative measure. *See* 8 U.S.C. § 1227(d)(1); *see also* Pet. Brief at 58-59 (noting that Congress ratified official policy of granting deferred action to applicants who made a "bona fide showing of eligibility" for U and T visas).

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[11] *See* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 Am. U. L. Rev. 1183, 1213-22 (2015).

The Family Fairness Program, claimed by petitioners as a precursor to DAPA, *see* Pet. Brief at 64, is actually an apt example of more narrowly tailored relief – one that served to guide *amici* in their official duties. Family Fairness, a product of close collaboration between the Congress and immigration officials, offered a temporary bridge to lawful status; very quickly, however, temporary executive branch relief was ratified by the Immigration Act of 1990.[12]

DAPA's proponents concede that Family Fairness's beneficiaries – the spouses and children of noncitizens legalized under IRCA – already had a pathway to legal status that was more direct than the daunting obstacle course that DAPA recipients must traverse. *See, e.g.*, 8 U.S.C. § 1153(a)(2)(A) (providing for family second preference visa petition that could be filed once the IRCA grantee became an LPR); Cox & Rodriguez, *The President and Immigration Law Redux*, 125 Yale L.J. at 121 n. 39 (noting that, "those legalized by ... IRCA would become eligible to petition for the admission of their spouses and children through the *already existing immigration system*") (emphasis added). Family Fairness merely eased a timing problem that exposed spouses and children of IRCA grantees to a short-term risk of deportation as they followed these paths to legal status.

Moreover, as even proponents of DAPA acknowledge, Family Fairness played out against the backdrop of imminent congressional approval. Both

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[12] Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Petitioners acknowledge that the 1990 statute ratified Family Fairness, and more. Pet. Brief at 6 (noting that "Congress responded by enacting a statutory program with broader relief").

the House and the Senate had separately approved relief for IRCA legalization grantees' families *prior to* Family Fairness's roll-out.[13] In November, 1990, less than 10 months after officials announced the Family Fairness program, President George H.W. Bush signed that year's Immigration Act, which ratified the program by barring the deportation of Family Fairness beneficiaries. *See* Immigration Act of 1990, Tit. III, § 301(a), 104 Stat. 5029. Rushing to remove spouses and children of IRCA grantees in that ten-month period would have needlessly snarled legal immigration, while producing a minimal pay-off in deterrence.

In essence, Family Fairness bridged the gap between IRCA and the 1990 Act. *See* Cox & Rodriguez, *The President and Immigration Law Redux*, 125 Yale L.J. at 120-21 (describing Family Fairness as "a form of transitional relief" bridging IRCA and the 1990 Immigration Act); Pet. Brief. at 57 (conceding that the 1990 Act ratified the Family Fairness program).

In contrast, no one can argue that DAPA is the product of executive collaboration with Congress, or that DAPA has any prospect of being ratified by Congress any time soon. *See Texas v. United States*, 809 F.3d 134, 185 (5th Cir. 2015) (noting that Congress "has repeatedly declined" to enact legislation that "closely resemble[s]" DAPA).

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[13] *See* American Immigr. Council, *Reagan-Bush Family Fairness: A Chronological History* 2-3 (Dec. 2014), available at http://www.americanimmigrationcouncil.org/sites/default/files/docs/reagan_bush_family_fairness_final.pdf (last visited March 6, 2016).

Finally, *amici* note that Petitioners prudently refrain from basing DAPA on Article II power to stay the deportation of nationals from particular countries. It is true that Presidents, seeking to exceed the more modest relief that Congress had expressly labeled as "*exclusive*," have asserted Article II power to protect foreign nationals in the U.S. from risks abroad,[14] most recently on behalf of certain Liberians who were granted Deferred Enforced Departure (DED).[15] In the

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[14] *Compare* 8 U.S.C. § 1254a(g) (2015) (declaring that Temporary Protected Status (TPS), which imposes rigorous eligibility requirements such as risk from an "ongoing armed conflict," *see id.* § 1254a(b)(1)(A), constitutes the "*exclusive authority*" for immigration officials to "permit deportable aliens to remain in the U.S. temporarily because of their particular nationality or region") (emphasis added), *with* George H.W. Bush, President of the United States, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), available at http://www.presidency.ucsb.edu/ws/index.php?pid=19117 (last visited March 25, 2016) (asserting that the Executive might have constitutional power to protect otherwise deportable foreign nationals that trumped express legislative limits); *cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084-96 (2015) (holding that President has the exclusive power to recognize foreign states).

[15] *See* President Barack Obama, *Presidential Memorandum – Deferred Enforced Departure for Liberians* (Sept. 26, 2014), available at https://www.whitehouse.gov/the-press-office/2014/09/26/presidential-memorandum-deferred-enforced-departure-liberians (last visited March 6, 2016) (announcing DED for Liberians who previously had TPS and asserting "my constitutional authority to conduct the foreign relations of the United States"); Pet. Brief at 50 (discussing DED for Liberians). Immigration officials also aided Chinese students who remained in or entered the U.S. after the 1989 post-Tiananmen Square crackdown. *See* Pet. Brief. at 49-50 (citing relief). Congress quickly ratified relief for Chinese students, although it has not ratified relief for Liberians. *See* Chinese Student Protection Act

case of DAPA, however, the President chose not to rely on his Article II authority.

The choice to forego Article II power as a basis for DAPA was prudent, because no overseas risk, such as chaos in the wake of an armed conflict or natural disaster, prevents prospective DAPA recipients' removal. Petitioners nonetheless now claim that past exercises of Article II authority constitute precedents for their sweeping claim of discretion under the INA. *See* Pet. Brief at 50 (citing Liberian program).

Respectfully, this is a *non sequitur*. The President has relied on Article II power to provide relief to foreign nationals only when the INA expressly left the President no discretion. *See* 8 U.S.C. § 1254a(b)(1)(A) (designating Temporary Protected Status (TPS) as "exclusive"). The Article II examples cited by Petitioners do not rely on the INA, and thus they have no bearing on this case.[16]

In sum, earlier examples of discretion under the INA were either expressly ratified by Congress or, like *amici*'s relief for 9/11 victims' families, served as a bridge to a grant of legal status such as a U visa. *See Texas v. United States*, 809 F.3d 134, 185 (5th Cir. 2015) (finding that Family Fairness was "interstitial to a statutory legalization scheme"). In contrast, as the court below noted, DAPA's sweeping exercise of

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of 1992, Pub. L. No. 102-404, 106 Stat. 1969, *noted in* 8 U.S.C. § 1255 (2016) (ratifying grants of deferred action).

[16] *Amici* take no position on the scope of the President's Article II authority to parole into the U.S. or defer the removal of noncitizens fleeing crises abroad.

discretion is "far from interstitial." *Id.* [17] As a result, DAPA is inconsistent with the INA's structure, logic, and purpose. It is also fundamentally inconsistent with *amici*'s own experience in the executive branch and how *amici* understood the limits of their discretion. Far from being grounded in history and experience, DAPA is from *amici*'s perspective a novel expression of executive power that clashes with long-settled congressional-executive understandings under the INA.

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[17] Fewer than 1,000 annual deferred action grants rest on extraordinary individual hardships, including those of a medical nature. *See* Shoba Sivaprasad Wadhia, Beyond Deportation: The Role Of Prosecutorial Discretion In Immigration Cases 69 (2015). While hardship-based deferred action is not interstitial to a grant of legal status, its rarity and the serious nature of the conditions it addresses minimize its adverse impact on deterrence of unlawful migration. *Amici* express no opinion on whether a measure such as 2012's Deferred Action for Childhood Arrivals (DACA), which provided relief to certain aliens who were brought to the U.S. as children, may fit under this hardship rubric. However, *amici* note that even President Obama expressed reservations about *DACA's* scope. *See* Univision News Transcript: *Interview with President Barack Obama*, available at http://communications-univisionnews.tumblr.com/post/79266471431/univision-news-transcript-interview-with (March 5, 2014) (last visited March 29, 2016) (cautioning that, "until Congress passes a new law, then I am constrained in terms of what I am able to do," and conceding that DACA "already stretched my administrative capacity very far"). *Amici* share the hesitation that the President expressed. Since DAPA's potential beneficiaries exceed DAPA's by a factor of ten, DAPA is an *a fortiori* case: If DACA pushes the envelope, DAPA tears it.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court below.

Respectfully submitted,

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March 31, 2016

Appendix A: List of Amici

Stewart A. Baker is an attorney in Washington, D.C. who served as the first Assistant Secretary for Policy in the U.S. Department of Homeland Security (DHS) during the administration of President George W. Bush. At DHS, he created and administered the 250-person Policy Directorate, and in that capacity participated in legislative immigration reform efforts during 2007. He also served as General Counsel for the National Security Agency from 1992-1994, and General Counsel of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction in 2004-2005. Mr. Baker hosts an influential podcast on law and cybersecurity, and is author of the book, *Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism* (2010), and editor of a national security blog of the same name. Mr. Baker is also a Contributing Editor to the Lawfare and Volokh Conspiracy blogs.

Paul Rosenzweig is an attorney in Washington, D.C. who served as Deputy Assistant Secretary for Policy at DHS in the administration of President George W. Bush. He is also a Senior Advisor to the Chertoff Group, run by former DHS Secretary Michael Chertoff. An expert on cybersecurity and law, he is author of the books, *Winning the Long War: Lessons from the Cold War for Defeating Terrorism and Preserving Freedom* (2005) (with James Jay Carafano) and *Cyber Warfare: How Conflicts in Cyberspace are Challenging America and the World* (2013), co-editor (with Timothy McNulty and Ellen Shearer) of two publications of the American Bar Association, *Whistleblowers, Leaks, and the Media:*

The First Amendment and National Security, and *National Security Law in the News: A Guide for Journalists, Scholars, and Policymakers* (2012), and a Contributing Editor to the Lawfare blog.

Nicholas Rostow served as General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations from 2001-2005, Staff Director for the U.S. Senate Select Committee on Intelligence, 1999-2000, Legal Adviser to the National Security Council, 1987-1993, and Special Assistant to the Legal Adviser, U.S. Department of State, 1985-1987. He formerly served as University Counsel and Vice Chancellor for Legal Affairs and full professor at the State University of New York, and as University Professor at the National Defense University. He is currently the Charles Evans Hughes Visiting Professor of Jurisprudence and Government at Colgate University. Recent law review articles include, *International Law and the Use of Force: A Plea for Realism*, 34 Yale J. Int'l L. 549 (2009).

Steven R. (Rick) Valentine is an attorney in Washington, D.C. who served as Deputy Assistant Attorney General in the administrations of Ronald Reagan and George H.W. Bush from 1988-1993, supervising the U.S. Department of Justice's Office of Immigration Litigation. He was a member of President George W. Bush's transition team for the Justice Department, and served as Chairman of the Board of Visitors of the Indiana University School of Law-Indianapolis.

Appendix B: Letter from Stewart Baker, Assistant Secretary, U.S. Dep't of Homeland Security, to Debra Brown Steinberg, Esq., Aug. 15, 2008 (redacted in part)

U.S. Department of Homeland Security
Washington, DC 20528
Aug 15, 2008

Debra Brown Steinberg, Esq.
Cadwalader Wickersham & Taft LLP
One World Financial Center
New York, NY 10821

Dear Ms. Steinberg,

You and your co-counsel have asked us for immigration relief for 16 people who lost a spouse or parent in the 9/11 attacks. All of those people are either in the United States unlawfully or in a status that could be challenged at any time. As a result, many members of the group, though they have been in this country for years, are still at risk of arrest and removal by immigration authorities.

The members of this small group share with all American a moment of loss and pain and pride that is now a defining part of our national history. The lives of these 16 men, women, and children are linked to the United States of America by a bond that is intimate and unique. They have now asked to become a permanent part of our nation.

The Department of Homeland Security was itself created as a result of the 9/11 attacks; many of us came to work here because of those attacks. We

feel a powerful connection – and a deep sense of obligation – to those who died in the attacks and to the loved ones who survived them.

We will grant your request, with two exceptions. First, we lack authority to grant permanent relief... [Remainder of this paragraph redacted.]

We intend to inform Congress of our determinations and, with your and your co-counsel's consent, will make available to Congress the appendix to this letter and all the information supplied to us by all 16 aliens, including copies of the proffers and substantive letters and emails between me, you, my staff, and the attorneys representing the aliens, subject to the same constraints and assurances under which the data was supplied to us. We expect that Congress in turn will use the information to decide whether permanent relief should be granted to the members of the group.

I look forward to your response and to our further cooperation in this matter.

Sincerely,

/s/ Stewart Baker
Assistant Secretary for Policy